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IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ANA LUCIA HODGE, ET AL.,
*Petitioners,*

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the Equal Access to Justice Act's provisions requiring the United States to pay attorney's fees and other expenses to private parties who prevail in adversary adjudications in which the government's position is not substantially justified apply to deportation proceedings brought by the Immigration and Naturalization Service.

## LIST OF PARTIES

As permitted by Rule 12.2 of this Court, this petition for writ of certiorari seeks review of three cases arising out of the same court and involving identical or closely related questions. The three cases are:

*Ana Lucia Hodge v. United States Department of Justice*, 929 F.2d 153 (5th Cir. 1991).

*Rodolfo Escobedo Gonzalez v. Immigration and Naturalization Service*, No. 90-4440 (5th Cir. April 22, 1991).

*Harold J. Amador-Castillo v. Immigration and Naturalization Service*, No. 90-4161 (5th Cir. April 4, 1991).

The parties to these proceedings in the United States Court of Appeals for the Fifth Circuit were Ana Lucia Hodge, Rodolfo Escobedo Gonzalez, and Harold J. Amador-Castillo, petitioners herein, and the United States Department of Justice and the Immigration and Naturalization Service, respondents herein.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED FOR REVIEW | i |
| LIST OF PARTIES | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| STATUTORY PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 6 |
| ARGUMENT | 11 |
| A. The Opinion of the Fifth Circuit in the Case at Bar is in Direct and Irreconcilable Conflict with the Opinion of the Ninth Circuit in *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*) | 11 |
| B. This Case Presents an Important Issue of Federal Law which has not been, but should be, Settled by this Court | 16 |
| C. The Question Presented for Review in this Case is Currently Pending before this Court on a Previous Grant of a Writ of Certiorari | 20 |
| CONCLUSION | 21 |
| APPENDIX (In Separate Volume) | A-1 |
| *Hodge v. United States Dep't of Justice*, 929 F.2d 153 (5th Cir. 1991) | A-1 |

*In Re: Ana Lucia Hodge*, No. A28305678, Decision of the Board of Immigration Appeals (BIA Feb. 1, 1990) ..... A-13

*In Re: Ana Lucia Hodge*, No. A28305678, Decision and Order of the Immigration Judge (denying attorney's fees) (Exec. Office for Imm. Review, Houston, Tex. May 10, 1989) ..... A-16

*Escobedo Gonzalez v. Immigration and Naturalization Service*, No. 90-4440 (5th Cir. April 22, 1991) ..... A-21

*In Re: Rodolfo Escobedo-Gonzalez*, No. A34451497, Decision of the Board of Immigration Appeals (BIA May 24, 1990) ..... A-23

*In the Matter of: Rodolfo Escobedo-Gonzalez*, No. A34451497, Order (denying attorney's fees) (Exec. Office for Imm. Review, Houston, Tex. April 17, 1990) ..... A-26

*Amador-Castillo v. Immigration and Naturalization Service*, No. 90-4161 (5th Cir. April 4, 1991) ..... A-28

*In Re: Harold J. Amador-Castillo*, No. A23620165, Decision of the Board of Immigration Appeals (BIA Feb. 1, 1990) ..... A-31

*In The Matter of: Harold J. Amador Castillo*, No. A23620165, Order (denying attorney's fees) (Exec. Office for Imm. Review, Harlingen, Texas Sept. 8, 1989) ..... A-34

## TABLE OF AUTHORITIES

CASES — Page

*Ardestani v. United States Department of Justice, Immigration and Naturalization Service*, 904 F.2d 1505 (11th Cir. 1990) ..... 16, 20

*Bridges v. Wixon*, 326 U.S. 135 (1945) ..... 18

*Castro-O'Ryan v. Department of Immigration & Naturalization*, 821 F.2d 1415 (9th Cir. 1987) ..... 19

*Clarke v. Immigration and Naturalization Service*, 904 F.2d 1505 (3rd Cir. 1990). ..... 16

*Escobar Ruiz v. Immigration and Naturalization Service*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*) ..... 11, 12, 13, 14, 15, 16

*Escobar Ruiz v. Immigration and Naturalization Service*, 813 F.2d 283, (9th Cir. 1987), *aff'd*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*) ..... 19

*Hodge v. United States Department of Justice*, 929 F.2d 153 (5th Cir. 1991) ..... 15, 16, 20

*Lok v. Immigration and Naturalization Service*, 548 F.2d 37 (2nd Cir. 1977) ..... 19

*Marcello v. Bonds*, 349 U.S. 302 (1955) ..... 11, 12, 15

*Ng Fong Ho v. White*, 259 U.S. 276 (1922) ..... 18

*Sullivan v. Hudson*, 490 U.S. 877 (1989) ..... 18

STATUTORY PROVISIONS — Page


5 U.S.C. § 504(a)(1) ..... 3

5 U.S.C. § 504(b)(1)(C) ..... 3, 11, 12, 13, 14

5 U.S.C. § 504(c)(2) ..... 10

5 U.S.C. § 554(a) ..... 4, 12, 13

5 U.S.C. § 554 ..... 11, 13

8 U.S.C. § 1105a(a)(1) & (2) ..... 11

8 U.S.C. § 1251(f) ..... 8

8 U.S.C. § 1252(b) ..... 4, 15

8 U.S.C. § 1362 ..... 15

28 U.S.C. § 1254(1) ..... 3

Equal Access to Justice Act, Pub. L. No. 96-481, §202, 94 Stat. 2325 (1980). ..... 18


MISCELLANEOUS


Sup. Ct. R. 17 ..... 3

H. R. Conf. Rep. No. 1434, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 5003 ..... 12

H. R. Rep. No. 1418, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984 ..... 12, 13, 18, 20

Page

H. R. Rep. No. 120, 99th Cong. 1st Sess. pt. 1 (1985), *reprinted in* 1985 U.S. Code Cong. & Ad. News 132 ..... 13, 14

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The petitioners, Ana Lucia Hodge, Rodolfo Escobedo Gonzalez, and Harold J. Amador-Castillo, respectfully pray that a writ of certiorari issue to review the judgments and the opinions of the United States Court of Appeals for the Fifth Circuit identified immediately below.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Ana Lucia Hodge v. United States Department of Justice* is reported at 929 F.2d 153 (5th Cir. 1991) and is reproduced as Appendix A-1 of Petitioners' Appendix submitted together with this Petition. The underlying Decision of the Board of Immigration Appeals is unreported and reproduced as Appendix A-2. The unreported Decision and Order of the Immigration Judge is reproduced as Appendix A-3.

The opinion of the United States Court of Appeals for the Fifth Circuit in *Rodolfo Escobedo Gonzalez v. Immigration and Naturalization Service*, No. 90-4440 (5th Cir. April 22, 1991) is unreported and reproduced as Appendix B-1. The underlying Decision of the Board of Immigration Appeals is unreported and reproduced as Appendix B-2. The unreported Order of the Immigration Judge is reproduced as Appendix B-3.

The opinion of the United States Court of Appeals for the Fifth Circuit in *Harold J. Amador-Castillo v. Immigration and Naturalization Service*, No. 90-4161 (5th Cir. April 4, 1991) is unreported and reproduced as Appendix C-1. The underlying Decision of the Board of Immigration Appeals is unreported and reproduced as Appendix C-2. The unreported Order of the Immigration Judge is reproduced as Appendix C-3.

Only those opinions of the Fifth Circuit, decisions of the Board of Immigration Appeals, and orders of the immigration judges related to the petitioners' applications for attorney's fees under the Equal Access to Justice Act are identified above and reproduced in Petitioner's Appendix. The petitioners' entitlement to those attorney's fees is the only issue presented for review by this Petition.

## JURISDICTION

The United States Court of Appeals for the Fifth Circuit

entered judgment in *Hodge* and *Amador-Castillo* on April 4, 1991, and in *Escobedo Gonzalez* on April 22, 1991. This petition for writ of certiorari regarding all three cases is filed within ninety days of the date of the first of those judgments. This Court's jurisdiction to review those judgments is invoked under and conferred by 28 U.S.C. § 1254(1) and Sup. Ct. R. 17.

## STATUTORY PROVISIONS INVOLVED

The four statutory provisions set out below are involved in this case.

The Equal Access to Justice Act's provision for payment of attorney's fees and costs in adversary administrative adjudications, 5 U.S.C. § 504(a)(1):

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

The Equal Access to Justice Act's definition of "adversary adjudication," 5 U.S.C. § 504(b)(1)(C):

> [A]dversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), and (iii) any hearing conducted under chapter 38 of title 31; . . . .

The Administrative Procedure Act's definition of covered agency adjudications, 5 U.S.C. § 554(a):

> This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—
>
> (1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
>
> (2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;
>
> (3) proceedings in which decisions rest solely on inspections, tests, or elections;
>
> (4) the conduct of military or foreign affairs functions;
>
> (5) cases in which an agency is acting as an agent for a court; or
>
> (6) the certification of worker representatives.

The Immigration and Nationality Act's provision governing deportation proceedings, § 242(b) of that Act, 8 U.S.C. § 1252(b):

> A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper

safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), or (19) of section 241(a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

## STATEMENT OF THE CASE

The facts hereinafter set forth are those alleged below by Ana Lucia Hodge, Rodolfo Escobedo Gonzalez, and Harold J. Amador-Castillo. Because in each case the immigration judge dismissed the application for attorney's fees under the Equal Access to Justice Act (hereinafter EAJA) on jurisdictional grounds without reaching the merits of the claim, the factual allegations relevant only to the attorney's fees issues have yet to be ruled upon by any tribunal.

### 1. *Ana Lucia Hodge v. United States Department of Justice*

Ana Lucia Hodge is an immigrant from Colombia who was accorded the status of having been lawfully admitted for permanent residence on a conditional basis by virtue of her

marriage to a citizen of the United States. Subsequent to obtaining that status, Mrs. Hodge left her husband because he beat her up. Without any sort of prior notice or opportunity to be heard, on August 3, 1988 the Immigration and Naturalization Service (hereinafter INS) terminated Mrs. Hodge's lawful status and instituted deportation proceedings against her based on the allegation that she had engaged in a fraudulent marriage to obtain her immigration status.

At the time it terminated her status, the INS told Mrs. Hodge that it had a sworn statement by her husband relevant to the validity or viability of their marriage. The INS never produced such a statement to Mrs. Hodge or to the immigration court, but nonetheless used that alleged statement as a basis for prosecuting the deportation proceedings against Mrs. Hodge. On February 22, 1989, the immigration judge terminated the deportation proceedings against Mrs. Hodge because of the INS's failure to provide her an opportunity to confront and respond to the allegations and evidence against her prior to terminating her status. On October 12, 1989, the INS accorded Mrs. Hodge the immigration status of having been lawfully admitted for permanent residence without conditions.

On March 23, 1989, Mrs. Hodge applied to the immigration court for an award of attorney's fees and expenses under the Equal Access to Justice Act, on the ground that the INS's termination of her status and institution of deportation proceedings against her without prior notice and opportunity to be heard was not substantially justified as contemplated by the fee-shifting statute. The immigration judge denied that application for want of jurisdiction by order dated May 10, 1989 (reproduced as Appendix A-3 hereto), and that denial was affirmed by the Board of Immigration Appeals (hereinafter BIA) in its decision of February 1, 1990 (reproduced as Appendix A-2 hereto). The United States Court of Appeals for the Fifth Circuit denied Mrs. Hodge's petition for review of the BIA's order. *Hodge v. United States Department of Justice*, 929 F.2d 153 (5th Cir. 1991) (reproduced as Appendix A-1 hereto).

2. *Rodolfo Escobedo Gonzalez v. Immigration and Naturalization Service*

Rodolfo Escobedo Gonzalez entered the United States as a lawful permanent resident in 1973. In 1981 the INS instituted deportation proceedings against him on the ground that at the time he first entered the United States from Mexico he failed to disclose that he was married. Mr. Escobedo applied for relief from deportation under 8 U.S.C. § 1251(f), which provides for such relief for persons who are the spouses, parents or children of United States citizens or lawful permanent residents and who were otherwise admissible at the time of their original entry.

Mr. Escobedo's application for relief from deportation was considered at a contested hearing before the immigration court in Houston, Texas on July 8, 1988. At that hearing the INS opposed Mr. Escobedo's application with a series of factual allegations lacking evidentiary support and legal propositions lacking authority. After receiving the evidence and arguments presented by counsel for the parties, the immigration judge found that every factor in the case weighed in Mr. Escobedo's favor, determined the evidence to be overwhelming on his side, announced that she could not "imagine a stronger case for the positive exercise of discretion than the one at bar," and granted Mr. Escobedo's application.

The INS appealed that decision to the BIA, where it supplemented the arguments it made before the immigration court with an additional series of unfounded and unexplained reasons that the decision in Mr. Escobedo's favor should be reversed, exemplified by the INS's assertion that the fact that Mr. Escobedo's insurance agent testified on his behalf rendered Mr. Escobedo's own credibility suspect. The INS submitted its appeal brief to the BIA (forcing Mr. Escobedo to do likewise) even after having been informed that the deportation case had been effectively mooted by virtue of Mr. Escobedo's legalization under the Immigration Reform and Control Act of 1986. Only after all briefing to the BIA had been completed did the INS withdraw its

appeal of the immigration judge's decision.

Mr. Escobedo then applied to the immigration court for an award of attorney's fees and expenses under the EAJA, on the ground that the INS's opposition to his application for relief from deportation, and in particular its aborted prosecution of an unfounded and useless appeal to the BIA, were not substantially justified. The immigration court dismissed Mr. Escobedo's application for attorney's fees and expenses for want of jurisdiction by order dated April 17, 1990 (reproduced as Appendix B-3 hereto), and the BIA affirmed that dismissal in its decision dated May 2[illegible], 1990 (reproduced as Appendix B-2 hereto). Mr. Escobedo's petition for review of the BIA's decision was denied by the United States Court of Appeals for the Fifth Circuit in its decision of April 22, 1991 (reproduced as Appendix B-1 hereto).

### 3. *Harold J. Amador-Castillo v. Immigration and Naturalization Service*

Harold J. Amador-Castillo came to the United States with his mother and sisters from his native country of Nicaragua at the age of eleven in February, 1980. Seven and one-half years later the INS instituted deportation proceedings against Mr. Amador, charging that he was deportable for having entered the United States without inspection, and also for having been convicted of two crimes involving moral turpitude. Mr. Amador conceded his deportability and applied for political asylum on the ground that he had a well founded fear of persecution were he to be returned to Nicaragua.

The basis of Mr. Amador's asylum application was that his father had been in charge of General Anastasio Somoza's boats during the Somoza government, and that for that reason his family members were suffering persecution at the hands of the Sandinista regime. Although the United States Department of State informed the INS prior to a hearing on Mr. Amador's asylum application that he did indeed have a well founded of persecution in

Nicaragua, the INS rejected that evaluation of Mr. Amador's asylum claim, and also rejected, without offering legal authority, his contention that the crimes for which he had been convicted did not constitute a basis for denying the relief from deportation he requested. On September 20, 1988 the immigration court granted Mr. Amador's asylum application.

Mr. Amador then applied for attorney's fees and expenses under the EAJA, arguing that the INS's opposition to his asylum application following the State Department's advisory letter was not substantially justified. The immigration court denied the application for attorney's fees and expenses for want of jurisdiction by order dated September 8, 1989 (reproduced as Appendix C-3 hereto), which denial was affirmed by the BIA in its decision of February 1, 1990 (reproduced as Appendix C-2 hereto). Mr. Amador's petition for review of the BIA's decision was denied by the United States Court of Appeals for the Fifth Circuit in its decision of April 4, 1991 (reproduced as Appendix C-1 hereto).

4. Basis for Decisions Below

The three decisions in each of the three cases share a common legal basis. In each case the immigration judge denied the petitioner's application for attorney's fees, the BIA affirmed that denial, and the Fifth Circuit denied the petition for review, on the ground that attorney's fees under the EAJA are not available in deportation proceedings.

5. Basis for Federal Jurisdiction Below

The basis for federal jurisdiction below in all three cases was 5 U.S.C. § 504(c)(2), the provision of the EAJA that allows a party dissatisfied with a determination of fees and other expenses made by a federal agency to appeal that determination "to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication." The court with jurisdiction to review the underlying decision in

the deportation proceedings brought against the three petitioners herein was the court of appeals for the judicial circuit in which those proceedings were conducted, *see* 8 U.S.C. § 1105a(a)(1) & (2), which, as all three deportation proceedings were conducted in Texas, was the United States Court of Appeals for the Fifth Circuit.

## ARGUMENT

### A. The Opinion of the Fifth Circuit in the Case at Bar is in Direct and Irreconcilable Conflict with the Opinion of the Ninth Circuit in *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*).

The coverage provision of the EAJA states that the Act applies to any "adversary adjudication," which it defines as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . ." 5 U.S.C. § 504(b)(1)(C). The legal issue presented in this case can be reduced to whether the word "under" in the quoted language means "as defined by," or alternatively "governed by" or "subject to." If "under" means "as defined by," then deportation proceedings are covered by the EAJA, because in deportation proceedings the government is represented by counsel, and such proceedings are clearly "adjudication[s]" *as defined by* "section 554 of this title" (the Administrative Procedure Act's definitional and coverage provision). If, on the other hand, "under" means "governed by" or "subject to" the Administrative Procedure Act (hereinafter APA), then the holding in *Marcello v. Bonds*, 349 U.S. 302 (1955), that the Immigration and Nationality Act supersedes the APA where the two diverge in relation to deportation proceedings, stands as a significant obstacle to the petitioners' position.

The first federal appellate court to rule on this issue was the United State Court of Appeals for the Ninth Circuit. In *Escobar Ruiz v. Immigration and Naturalization Service*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*), that court addressed and analyzed the applicability of the EAJA to deportation proceedings. The

government contended that "under" in 5 U.S.C. § 504(b)(1)(C) means "governed by" or "subject to," and when combined with *Marcello v. Bonds*, 349 U.S. 302 (1955), operates to remove deportation proceedings from the scope of the EAJA. The petitioner argued that the EAJA applies to deportation proceedings because "under" means "as defined by," and deportation proceedings are adversary and meet 5 U.S.C. § 554(a)'s definition of "adjudication." The Ninth Circuit thought both proferred readings of "under" plausible on their face, *Escobar Ruiz*, 838 F.2d at 1023, but found its inquiry answered by the 1980 legislative history of the EAJA, the purpose of the original statute as expressed by Congress, and the legislative history of the EAJA's re-enactment in 1985.

First, the court looked to the Joint Explanatory Statement on the EAJA issued by the Conference Committee at the time that it delivered the bill to the President for his signature, and there found persuasive support for Mr. Escobar Ruiz's position in the Committee's announcement that § 504(b)(1)(C) "defines adversary adjudication as an agency adjudication *defined under* the Administrative Procedure Act where the agency takes a position through representation by counsel or otherwise." H. R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5003, 5012. *See Escobar Ruiz*, 838 F.2d at 1023 (emphasis supplied by Ninth Circuit).

Next, the court looked for the purpose of the EAJA as stated by Congress, and found that the premise of the statute, as reflected in the original House Report on the bill, H. R. Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4988-89, was that a party litigating an issue against the government helps refine and formulate public policy by subjecting government action to the test of the adversary system, and thereby helps insure the legitimacy and fairness of the law. *Escobar Ruiz*, 838 F.2d at 1025. The purpose of the EAJA, therefore, was to promote this salutary function of the adversary process and "to increase the accessibility to justice" by ensuring that private litigants "will not be deterred from seeking review of,

or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights." *Id.* at 1025-26, *quoting* H.R. Rep. No. 120, 99th Cong. 1st Sess. pt. 1 4, 8 (1985), *reprinted in* 1985 U.S. Code Cong. & Ad. News 132, 132-33, 136.

With the statute's purpose revealed, the Ninth Circuit found the original House Report's explanation of why attorney's fees would be awarded only in those adversary federal administrative agency proceedings constituting "adjudications" under 5 U.S.C. § 554 to be relevant to the court's inquiry. The House had explained that it was in situations where parties "have a concrete interest at stake" but nevertheless may be deterred from asserting or defending that interest because of the time and expense involved in pursuing administrative remedies that individuals' attempts to protect their rights against the government will be most costly, and also most likely to define and promote public policy by subjecting the government's position to the scrutiny of the adversary system. *Escobar Ruiz*, 838 F.2d at 1026, *citing* H.R. Rep. No. 1418, *supra*, at 14, *reprinted in* 1980 U.S. Cong. & Ad. News 4984, 4993.

That focus, explained the Ninth Circuit, indicated that the reference to 5 U.S.C. § 554 in § 504(b)(1)(C) was not designed to limit the coverage of the EAJA to adjudications technically governed by the APA, but rather was intended to identify the type of agency proceedings that were most likely to produce both the injustices EAJA sought to remedy (private parties being forced to endure improper government action rather than to contest it because of the expense of representation), and the additional benefits it sought to bring (the testing of public policy by the adversary process). The court found that it would be inconsistent with both of these purposes, and therefore with the policies and purposes of the EAJA, to limit that statute's coverage to adversary adjudications technically governed by 5 U.S.C. § 554 and exclude other adjudications meeting § 554(a)'s definition that were equally adversary and equally burdensome. *Escobar Ruiz*, 838 F.2d at 1026.

The Ninth Circuit in *Escobar Ruiz* finally found support for

the "as defined by" construction of "under" in the treatment Congress gave Social Security administrative hearings. While Congress considered most such proceedings to fall outside the scope of the EAJA because they are not "adversary," it expressly indicated that it believed Social Security administrative hearings in which the government is represented by counsel to be included within the EAJA's coverage. *Escobar Ruiz*, 838 F.2d at 1027, *discussing* H.R. Rep. No. 120, 99th Cong., 1st Sess. pt.1 10, *reprinted in* 1985 U.S. Code Cong. & Ad. News, 132, 138-39. The significance of that partial inclusion of Social Security administrative hearings to the issue under consideration, according to the Ninth Circuit, was that at the time whether such hearings were "governed by" the APA was very much an open question. *Escobar Ruiz*, 838 F.2d at 1026. By finding them to constitute "adversary adjudications" within the meaning of 5 U.S.C. § 504(b)(1)(C) in spite of that uncertainty, reasoned the court, Congress indicated that it was looking to the nature of an administrative proceeding, not to the identity of its governing statute, to determine whether the EAJA applied. *Escobar Ruiz*, 838 F.2d at 1027.[1]

For these reasons, the Ninth Circuit ruled that "under" means "as defined by," and that the words "an adjudication under section 554" contained in 5 U.S.C. § 504(b)(1)(C) therefore mean "an adjudication determined, by statute, on the record and after an opportunity for an agency hearing." As deportation proceedings met that definition, the court found them to be covered by the administrative fee-shifting provisions of the EAJA, and rejected the government's arguments to the contrary as resting on a "hypertechnical interpretation of the EAJA" unsupported in the statute or its legislative history. *Escobar Ruiz*, 838 F.2d at 1027, 1030.

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1. The *Escobar Ruiz* court found the government's position that deportation proceedings cannot be covered by the EAJA because they are not governed by the APA to be inconsistent with its ackowledgment that Social Security proceedings can be covered by the EAJA even though they may not be conducted under the authority of the APA. *Escobar Ruiz*, 838 F. 2d at 1027 & n. 10.

In reaching its decision, the Ninth Circuit also took the opportunity to examine *Marcello v. Bonds*, 349 U.S. 302 (1955), which was the primary authority offered as support for the government's position. The court determined that *Marcello* did not remove deportation proceedings from the APA altogether, but held only that 8 U.S.C. § 1252(b) "supersedes" the APA's hearing provisions where the two statutes diverge. *Escobar Ruiz*, 838 F.2d at 1025. That distinction deserved special attention, according to the court, in evaluating the impact of *Marcello* on the question of whether the EAJA applies to deportation proceedings. That was because the underlying divergence that caused the *Marcello* Court to determine that 8 U.S.C. § 1252(b) supersedes the APA's hearing provisions--the Immigration and Nationality Act allowed for a single officer to act as judge and prosecutor in deportation proceedings, which was sharply different from the APA's requirement that the prosecutorial and judicial functions be wholly separate--had been eradicated, *Escobar Ruiz*, 838 F.2d at 1025, leaving "[t]he hearing provisions of the INA and the APA [] now fundamentally identical." *Id.* at 1025. The Ninth Circuit's suggestion was that the disappearance of the divergence between the two classes of procedures leaves nothing in the APA for 8 U.S.C. § 1252(b) to supersede, and that therefore *Marcello*, while not overruled, has lost its relevance. *Id.*

In the case at bar, the Fifth Circuit addressed precisely the same statutory provisions, analyzed essentially the same authorities, and reached exactly the opposite conclusion.[2] *Hodge*

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2. The *Escobar Ruiz* court also reached and decided the disputed issue of whether 8 U.S.C. § 1362, the Immigration and Nationality Act's right-to-counsel provision, precludes application of the EAJA to deportation proceedings by according persons in deportation proceedings the "privilege of being represented (at no expense to the Government)." The Ninth Circuit found that provision not to constitute a bar to fee shifting under the EAJA. *Escobar Ruiz*, 838 F.2d 1028-29. Although the parties to the instant case raised and argued this issue below, the Fifth Circuit did not reach it.

*v. United States Department of Justice*, 929 F.2d 153 (5th Cir. 1991).[3] The decision of the Fifth Circuit[4] is therefore in direct and irreconcilable conflict with the decision of the Ninth Circuit in *Escobar Ruiz*, and only review by this Court can resolve that conflict.

B. This Case Presents an Important Issue of Federal Law which has not been, but should be, Settled by this Court.

It is seductively easy to characterize the issue presented in this case in a manner that belittles its importance. While this Court's construction of "under" might well resolve the dispute, the petitioners do not come to this Court solely for the purpose of learning what "under" means. Judicial determinations of the EAJA's coverage, and in particular such determinations made by this Court, do not merely define the law in order to allow people to conform their conduct to same. Nor do they simply redistribute resources among litigants, or decide which of two or more competing parties will receive or pay for a particular public or private good. Rather, they determine whether persons forced into legal battle with their own government will have access to the resources necessary to defend themselves.

It is therefore wrong to view the issue in dispute in this case simply as whether a party who prevails against the government in deportation proceedings can recover his or her attorney's fees, because to do that suggests and assumes that the EAJA coverage issue arises and takes on importance only after the deportation

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3. *Hodge* is the Fifth Circuit's pronouncement on the issue. The other two decisions for which review is sought by this Petition were brief, unpublished, per curiam opinions adopting *Hodge* as controlling authority. *See* Appendix B-1 and Appendix C-1 hereto.

4. Two other courts of appeals have reached the same result on this issue. *See Clarke v. Immigration and Naturalization Service*, 904 F.2d 172 (3rd Cir. 1990), *Ardestani v. United States Department of Justice, Immigration and Naturalization Service*, 904 F.2d 1505 (11th Cir. 1990), *cert granted*, March 4, 1991.

proceedings conclude in the private party's favor. That assumption erroneously reduces both the class of persons affected by the issue presented by this case and the significance of the issue itself to such persons.

The persons affected by the availability of attorneys' fees under the EAJA in deportation proceedings include not only those who hire counsel and prevail in those proceedings, but more importantly those who upon the initiation of such proceedings find themselves, or will find themselves if the Fifth Circuit's decision is allowed to stand, unable to mount a defense against the government due to lack of resources. The ability of a person who successfully defended himself against unjustified government action in deportation proceedings to recover his attorney's fees and expenses under the EAJA is certainly important to that person. However, the *possibility* of recovering such fees and expenses is tremendously more important to the other person who would otherwise be unable to obtain representation in deportation proceedings, because it represents his only chance to defend himself. Denied that chance, he goes quietly, and the questions of whether the government's actions in achieving his deportation were lawful, proper, and justified are never asked and never answered.

The purpose of the EAJA is therefore not just to allow litigants to recover from the government the attorney's fees the government unreasonably causes them to incur, although that is how the statute operates and achieves its purpose. Congress stated the purpose of the EAJA with unmistakable clarity in both the statute's title—Equal *Access to Justice* Act—and in its legislative history:

> The bill rests on the premise that certain individuals, partnerships . . . and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights. The

> economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney's fees, expert witness fees and other expenses against the United States . . . .

H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5-6, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984[5]. Given that clear declaration of statutory purpose, courts called upon to interpret the EAJA should "endeavor to interpret the fee statute . . . in light of its purpose to diminish the deterrent effect of seeking review of, or defending against, governmental action . . . ." *Sullivan v. Hudson*, 490 U.S. 877, 889-90 (1989) (interior quotations omitted).

In no other area of the law do the purpose and effects of EAJA coverage have greater importance than they have in deportation proceedings. First, the interests at stake for the private litigant involved in those proceedings are enormous. The Supreme Court recognized long ago that deportation, which is the sanction imposed on an unsuccessful private litigant, can deprive a person of "all that makes life worth living." *See Ng Fong Ho v. White*, 259 U.S. 276, 284 (1922). *See also Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("[D]eportation . . . visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty--at times a most serious one--cannot be doubted.")

Second, the parties to deportation proceedings are perforce mismatched. On one side is the United States, acting through and represented by its Department of Justice, which can be fairly characterized as the world's largest law firm and the possessor of unrivaled expertise regarding the immigration and nationality laws it interprets, administers and enforces. On the other side is an immigrant, often poor and relatively or absolutely uneducated, and

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5. That same language appears in the "Findings and Purpose" provision of EAJA as originally enacted. *See* Equal Access to Justice Act, Pub. L. No. 96-481, § 202, 94 Stat. 2325 (1980).

likely to be unfamiliar with our language and the workings of our legal system. *See Escobar Ruiz v. Immigration and Naturalization Service*, 813 F.2d 283, 292 (9th Cir. 1987), *aff'd*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*).

Third, the mismatched parties engage one another over the tremendous (to the private party) interests at stake on a field of battle defined and occupied by the maze of the immigration and nationality laws and their administrative and judicial interpretations. The complexity of those laws and procedures is the stuff of legend. As one federal judge has written:

> We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges. In this instance, Congress, pursuant to its virtually unfettered power to exclude or deport natives of other countries, and apparently confident of the aphorism that human skill, properly applied, can resolve any enigma that human inventiveness can create, has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle.

*Lok v. Immigration and Naturalization Service*, 548 F.2d 37, 38 (2nd Cir. 1977) (Kaufman, Chief Judge). *See also Castro-O'Ryan v. Department of Immigration & Naturalization*, 821 F.2d 1415, 1419 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity.") (interior quotations omitted).

In light of the tremendous interests at stake in deportation proceedings, the nature of (and relative distribution of resources between) the parties to such proceedings, and the great complexity of the laws involved, it is hard to imagine any other area of administrative litigation in which representation by counsel is more important, *see Castro-O'Ryan*, *supra*, 821 F.2d at 1419, or in which Congress's purposes in enacting EAJA would apply with

greater force. If the EAJA, as the Fifth Circuit in *Hodge* found, does not cover deportation proceedings, then a party without his own funds to hire counsel has no realistic opportunity to respond to unjustified governmental action in those proceedings and no effective means to secure vindication of his rights, and is therefore forced to endure a governmentally inflicted injustice because he is unable to contest it, which is precisely the wrong EAJA was passed to right. *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9-10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4984, 4988.

To allow the Fifth Circuit's decision in *Hodge* to stand and become the law of the land would frustrate the EAJA's purpose with regard to the very persons it would seem to best serve. Whether that is to happen is an important issue of federal law that should be decided by this Court.

C. The Question Presented for Review in this Case is Currently Pending before this Court on a Previous Grant of a Writ of Certiorari.

On March 4, 1991, this Court granted a petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit in *Ardestani v. United States Department of Justice, Immigration and Naturalization Service*, 904 F.2d 1505 (11th Cir. 1990). The *Ardestani* case presents for review the same question presented by this case. *Ardestani* will apparently be scheduled for oral argument in the next Term of this Court and decided some time thereafter.

Based on the pendency of *Ardestani* in this Court, the petitioners respectfully suggest that the best option for future proceedings in this case is that this Petition be granted, and this case be combined with *Ardestani* for oral argument and/or decision. That would allow this Court to consider the additional arguments presented in this case in resolving the common issue shared by this case and *Ardestani*.

## CONCLUSION

For the reasons stated above, petitioners respectfully request that their Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be granted, that the Fifth Circuit's decisions be reversed, and that these cases be remanded to that court for further proceedings.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 2 1991
OFFICE OF THE CLERK

NO. 91-83

IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ANA LUCIA HODGE, ET AL.,
*Petitioners*,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
*Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITIONERS' APPENDIX

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**APPENDIX A-1**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-4122

ANA LUCIA HODGE,
Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

Petition for Review of an Order of the Immigration and Naturalization Service

(April 4, 1991)
(Reported at 929 F.2d 153 (5th Cir. 1991))
Before GOLDBERG, KING AND DUHÉ, Circuit Judges.
KING, Circuit Judge:

Petitioner Ana Lucia Hodge (Hodge) is a Colombian citizen who prevailed in deportation proceedings brought by the respondent Immigration and Naturalization Service (INS). She now petitions for review of a decision by the Board of Immigration Appeals (BIA) denying her motion for attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. We find that the EAJA does not apply to deportation proceedings before the INS, and therefore deny Hodge's petition for review.

I. Background

The INS commenced deportation proceedings against Hodge on August 3, 1988, with the issuance of an Order to Show Cause, charging that Hodge was deportable under 8 U.S.C. § 1251(a)(2) as an alien who remained in the United States for a longer period of time than permitted by the INS. A superseding Order to Show

Cause was issued on December 8, 1988, in which Hodge was charged to be deportable under 8 U.S.C. § 1251(a)(9)(B) as an alien whose conditional permanent residence was terminated under 8 U.S.C. § 1186a.

On February 22, 1989, an immigration judge terminated the deportation proceedings as improvidently begun in light of INS's failure to comply with 8 C.F.R. § 103.2(b)(2) when terminating the petitioner's conditional permanent resident status. On March 23, 1989, Hodge submitted a motion for attorney's fees under the EAJA. The immigration judge dismissed Hodge's request for lack of jurisdiction. On June 7, 1989, Hodge appealed the decision of the immigration judge to the BIA. The BIA affirmed the decision of the immigration judge and dismissed the appeal on February 1, 1990, on the basis that the Attorney General "has determined that immigration proceedings do not come within the scope of the EAJA" and "absent a regulatory change or controlling court order, an immigration judge has no authority under law or regulation to consider an application for attorney fees under the provisions of the EAJA."

## II. Discussion

Under the Equal Access to Justice Act, parties in certain adversary administrative proceedings may recover attorney's fees and costs from the government. 5 U.S.C. § 504(a)(1) provides that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." The EAJA primarily serves to ensure that individuals "will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights." [1]

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1. H.R. Rep. No. 120, 99th Cong., 1st Sess. 4 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 132-33.

Under 5 U.S.C. § 504(b)(1)(c)(i), an "adversary adjudication" is defined as "an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . . " Section 554 of Title 5 delineates the procedures for agency adjudications required under the Administrative Procedure Act (APA). Our determination of whether the EAJA applies to deportation proceedings before the INS requires us to consider the interrelationship between the INA, the APA, and the EAJA. Specifically, we must decide in this case whether Congress, in defining the scope of the EAJA, intended the term "under section 554" to encompass deportation proceedings.

Deportation proceedings (brought pursuant to the INA) comport closely with the requirements of the APA because the procedural dictates for deportation proceedings were modeled after the APA's requirements for adjudications. *See Marcello v. Bonds*, 349 U.S. 302, 309 (1955). Given the close resemblance of deportation proceedings to APA adjudications, Hodge asserts that the delimiting phrase of the EAJA — adjudications "under section 554" — applies to adjudications conducted consistent with the requirements of section 554, even if they are not directly governed by section 554.[2]

2. The Supreme Court held in *Marcello v. Bonds* that the statutory provisions of the INA related to deportation proceedings expressly supersede the hearing provisions of the APA, 349 U.S. at 310. According to the Ninth Circuit's interpretation of *Marcello* in *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (en banc), *Marcello* held only that the INA supercedes the APA's hearing provisions where the two statutes diverge. Because the hearing provisions of the two statues have, since *Marcello* was decided, become "fundamentally identical," the court reasoned that there is nothing for the INA to supercede and the *Marcello* holding therefore does not apply to foreclose the application of the EAJA to deportation proceedings. 838 F.2d at 1025. We are not convinced by the Ninth Circuit's argument. Even though the technical holding of *Marcello* was that the INA supercedes the APA, the Court referred to "the direction in the [INA] that the methods therein prescribed shall be the *sole and exclusive* procedure for deportation proceedings." 340 U.S. at 310 (emphasis added). The Court stated, moreover, that "this clear and categorical direction was meant to *exclude* the application of the Administrative Procedure Act . . . ." *Id.* at 309 (emphasis added). The Court stated, finally, that the APA "was intended only as a model." *Id.* Based upon this language, we cannot conclude that the Supreme Court

A. Statutory Analysis of the EAJA

1. Statutory Language

Hodge relies on the Ninth Circuit case *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*) (holding EAJA applies to deportation proceedings), for the proposition that the words "under section 554" — as used in section 504 of the EAJA — encompass adjudications "as defined by section 554." *Id.* at 1024. The Ninth Circuit found that this reading was supported by the EAJA's legislative history, its remedial purposes, and the interpretation given the statute by the Administrative Conference of the United States (ACUS). *Id.* at 1023-26.

Other circuits, however, have reached a contrary conclusion. The Third, Sixth, Eleventh, and D.C. Circuits have all stated that, although the remedial purposes of the EAJA would be served by applying it to deportation proceedings, neither the statutory language nor the legislative history of the EAJA supports the finding that Congress intended the EAJA to reach deportation proceedings. With respect to the usage of the word "under" in the EAJA, the D.C. Circuit — in addressing the question whether "under" could mean "as defined by," —was "unwilling so to stretch the word 'under' because the usage of the word in EAJA itself tugs against such creative reading . . . ." *St. Louis Fuel and Supply Co. v. FERC*, 890 F.2d 446, 449 (D.C. Cir. 1989).[3]

The court noted that the usage of the word "under" at other locations within the EAJA could mean nothing other than "subject [or pursuant] to" or "by reason of the authority of."[4] The *St. Louis*

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intended to leave open the possibility that the APA would "govern" deportation proceedings if the INA and the APA became functionally equivalent.

3. The *St. Louis* court held that proceedings under the Department of Energy Organization Act provision on contests to remedial orders were not "adversary adjudications" covered by the EAJA.

4. The D.C. Circuit cited the following examples from the EAJA to support its analysis:

> A party seeking an award of fees and other expenses shall . . . submit to the agency an application which shows that the party is a

court noted, furthermore, that the meaning of "under" that it gleaned from the EAJA's use of the word in other locations of the Act comports with its dictionary definition, while the alternative definitions suggested by Hodge do not. *Id.* at 450 n. 4.

We are to assume "'that the legislative purpose is expressed by the ordinary meaning of the words used'" in the statute, [5] and find, based on the foregoing, that the ordinary meaning of "under," especially in the contest of the EAJA, appears to be "governed by" or "subject to." In "rare and exceptional circumstances," however, legislative history justifies departure from the plain language of a statute because it evinces legislative intent contrary to that language.[6] We therefore examine the legislative history of the EAJA to ascertain whether Congress implied an intention to extend the EAJA to deportation proceedings.

2. Legislative History

Turning to the legislative history of the EAJA for support, Hodge notes that the *Escobar Ruiz* court relied, in part, on a 1980 House conference report that described an "adversary adjudication" as "an agency adjudication *defined under* the Administrative Procedure Act where the agency takes a position

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> prevailing party and is eligible to receive an award ***under*** this section . . . .
>
> 5 U.S.C. § 504(a)(2) (emphasis added).
>
> If a party other than the United States is dissatisfied with a determination of fees and other expenses made ***under*** subsection (a) . . . .
>
> 5 U.S.C. § 504(c)(2) (emphasis added).
>
> Fees and other expenses awarded ***under*** this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.
>
> 5 U.S.C. § 504(d) (emphasis added).

890 F.2d at 450.

5. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

6. *Rubin v. United States*, 449 U.S. 424, 430 (1981) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

through representation by counsel or otherwise." 838 F.2d at 1023 (quoting H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 23 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 5003, 5012 (emphasis added)). Several circuits have since stated, however, that this bit of legislative history provides very attenuated support for the *Escobar Ruiz* court's expansive holding.

> For example, the Sixth Circuit stated in *Owens v. Brock* that [t]he use of the words "defined under" by the House Conference report is not particularly instructive. There is no evidence in the legislative history to indicate that the conference committee understood the term "defined under" to include within EAJA coverage those proceedings that are not governed by section 554 but instead are merely conducted in a similar manner. In fact, the use of a concrete term such as "defined" leads us to believe it probable that Congress intended precisely the opposite interpretation of section 504 (b)(1)(C) from the one taken by the Ninth Circuit.

860 F.2d 1363, 1366 (6th Cir. 1988).[7] The D.C. Circuit, moreover, in *St. Louis*, criticizes the *Escobar Ruiz* court's reading of the conference report, pointing out, *inter alia*, that the definition provision placed in the conference text was identical to the one reported by the House Judiciary Committee, whose report indicates that "under" means "subject to." 890 F.2d at 450-51.

In a recent Third Circuit opinion, moreover, the court stated that "*Escobar Ruiz*'s interpretation of 'an adjudication under section 554' strikes us as strained and untenable. In our view, *Escobar Ruiz* was justifiably criticized in *Owens v. Brock* and *St. Louis Fuel and Supply Co.* for its expansive statutory interpretation." *Clarke v. INS*, 904 F.2d 172, 175 (3rd Cir. 1990) (citations omitted). The Eleventh Circuit also rejects the Ninth Circuit's statutory interpretation, stating that they "are persuaded

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7. In *Owens*, the Sixth Circuit held that workers' compensation hearings conducted pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.*, are not adversary adjudications under the EAJA, since FECA explicitly exempts such proceedings from section 554 hearing requirements.

by the reasoning of the Sixth and District of Columbia Circuits as well as . . . [the] Third Circuit decision" that Congress intended "under" in section 504 to mean "governed by" or "subject to" section 554. *Ardestani v. United States Dep't of Justice, INS*, 904 F.2d 1505, 1510-11 (11th Cir. 1990).

Despite the overwhelming judicial authority to the contrary, we nevertheless consider Hodge's arguments in turn. Among other things, she finds support for her position in Congress' statement — in the legislative history to the 1985 amendments to the EAJA — that social security administrative hearings in which the government is represented by counsel are covered by the EAJA.[8] She argues that prior to this clarification, Congress had not determined whether the APA applied to social security hearings; therefore, in deciding to apply the EAJA to social security hearings, Congress was demonstrating its intent to enlarge the scope of the EAJA *beyond* adversary adjudications clearly "governed" by section 554. The Third Circuit, however, was "unable to draw such a clear conclusion from the legislative history" and stated that "the EAJA's 1985 legislative history strongly suggests that Congress believed social security proceedings to be covered by section 554, but considered that the hearings were not 'adversary adjudications' within the meaning of EAJA because the position of the United States was typically not represented by counsel." 904 F.2d at 176, 177. We agree with the analysis of the Third Circuit.

In two instances Congress has, on the other hand, affirmatively extended the EAJA to encompass proceedings previously considered outside the ambit of that statute. In 1985, Congress amended section 504(b)(1)(C) to include certain administrative proceedings under section 6 of the Contract Disputes Act of 1978, 41 U.S.C. § 605.[9] In 1986, Congress further

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8. *See* H.R. Rep. No. 120, 99th Cong., 1st Sess. 10 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 138-39.

9. Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, § 1(c)(2)(B), 99 Stat. 184 (1985). Through this amendment, Congress

amended that section of the EAJA to incluc proceedings under the Program Fraud Civil Remedies Act of 198ᵥ, 31 U.S.C. § 3801.[10] We believe that Congress' narrowly ailored, rather than blanket, extensions of the EAJA to very specific types of administrative proceedings lends further supt ort to the inference that Congress did not intend for the EAJA t reach deportation proceedings.[11]

Moreover, prior to Congress' amendme t of the EAJA in 1985, the Attorney General, in 1984, promulga d a regulation that excluded deportation proceedings from the EA A.[12] We agree with the *Clarke* court's statement that "[a]lthough ve cannot assume that Congress implicitly ratified the At orney General's interpretation of the EAJA's reach, we likewis cannot conclude from the ambiguous legislative record that Co gress intended to overturn that regulation." *Clarke*, 904 F.2d at 177. We are also confronted with the Congressional provision in ection 292 of the INA, 8 U.S.C. § 1362, that an alien in deport tion proceedings "shall have the privilege of being represented (*at no expense to the Government*)" by counsel of his choice (emph sis added). This provision, which precludes the right to *appo nted* counsel in deportation proceedings, does not necessarily ac as a bar against fee-shifting. It is conceivable, however, that th e provision was

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legislatively overruled the holding of *Fidelity Constr. Co. v. United States*, 700 F.2d 1379 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983). *See* H.R. Rep. No. 120, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 144

10. Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 6103(c), 100 Stat. 1948 (1986).

11. *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. . . . This principle of statutory construction reflects an ancient maxim - - expressio unius est exclusio alterius."); *see also Quarles v. St. Clair*, 711 F.2d 691, 699 n.22 (5th Cir. 1983).

12. 28 C.F.R. § 24.103.



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intended to prevent all forms of government funding of counsel for aliens in deportation proceedings.

Further evidence of Congressional intent to broadly apply the EAJA, cited by Hodge, includes the statement accompanying the Model Rules for the Implementation of the EAJA issued by the Administrative Conference of the United States (ACUS). That statement advises agencies to take "broad interpretation of the reference to adjudications 'under section 554' largely to avoid protracted debate about whether particular proceedings fall within its ambit." It adds that "considering the purposes of the [EAJA], questions of its coverage should turn on substance . . . rather than technicalities." *Escobar Ruiz*, 838 F.2d at 1024 (quoting Administrative Conference of the United States, Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900-32,901 (1981)).

Although we find this pronouncement by the ACUS on how to effectuate the EAJA to be less compelling evidence of Congressional intent than did the *Escobar Ruiz* court, we do not reject the statement wholesale as did the *Owens* court.[13] In criticizing *Escobar Ruiz*'s interpretation of the model rules, the *Owens* court suggested that other language in the ACUS's model rules and commentary in effect adopted the "governed by" interpretation of "under." The rules state that, "[w]here it is clear that certain categories [of proceedings] are *governed by* [section 554], agencies should list the types of proceedings in their rules." 860 F.2d at 1366 (emphasis added). We do not agree with the

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13. We also do not agree with the *Owens* court that "the ACUS rules . . . eschew a broad interpretation of 504(b)(1)(C) . . . ." The Sixth Circuit based this statement on language in the ACUS rules that "the liberal interpretation of the draft model rules may provide for broader applicability than Congress intended." The ACUS was apparently concerned with agency proceedings that voluntarily use section 554 procedures, and consequently eliminated those proceedings from EAJA coverage. We do not, nor should we, infer from the ACUS's statement that they meant, for the purposes of EAJA coverage, to equate agency proceedings that voluntarily use section 554 procedures, with those, like deportation proceedings, that are mandated to use section 554 procedures (through the mandate stems not from the APA but from other statutory authority).

*Owens* court that the usage of "governed by" in this context should be interpreted as a strict limitation on the application of the EAJA to proceedings that are technically governed by section 554. In our view, the provision at issue merely seeks to identify those types of proceedings that are clearly covered, leaving open the question whether proceedings that are Congressionally required to follow the procedures of 554, but are not technically governed by 554, fall within the ambit of the EAJA.

Hodge also refers to the House Report for the 1985 reauthorization of the EAJA issued by the Judiciary Committee. That report notes that the courts have been construing the EAJA too narrowly. The examples to which the House Report points, however, do not concern the issue at bar. Rather, the report refers to judicial construction of other terms in the Act, namely "position of the United States" and "substantially justified." These concerns shed no light on the question of how to interpret "adjudications under section 554." *See* 813 F.2d at 290; H.R. Rep. No. 120, 99th Cong., 1st Sess., *reprinted in* 1985 U.S. Code, Cong. & Admin. News 132.

Having carefully considered the text and legislative history of the EAJA, we do not find sufficient evidence of congressional intent to apply the EAJA expansively. Although we agree that the purposes of the EAJA would be furthered by its application to deportation proceedings, we are constrained by general principles of statutory interpretation to hold that it does not apply.

B. Sovereign Immunity Waivers

Our holding is also necessarily influenced by the Supreme Court's pronouncement that statutes waiving the government's general immunity from attorneys' fee claims must be "construed strictly in favor of the sovereign" and not "enlarge[d] . . . beyond what the language requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951), and *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)). Because deportation proceedings are not clearly within the scope of the EAJA, we believe that it is incumbent upon

Congress, not this court, to enlarge the statute to include such proceedings if that is the result that Congress intended.

III. Conclusion

For the foregoing reasons, we AFFIRM the decision of the Board of Immigration Appeals and DENY the petition for review.

GOLDBERG, Circuit Judge, dissenting:

> Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore,
> Send these, the homeless, tempest-tossed to me:
> I lift my lamp beside the golden door.[1]

I cannot help but wonder how many immigrants arriving through New York harbor now wonder if the outstretched arms of the Statute of Liberty are meaningful or meaningless. I respectfully dissent from the majority's holding and would adopt the holding and rationale of *Escobar Ruiz v. I.N.S.*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*).

The Equal Access to Justice Act (EAJA) is a statutory mandate of significant value in our jurisprudence. There is no doubt in my mind that the EAJA's legislative history does not clearly indicate whether Congress intended this mandate to extend to immigration proceedings. We must therefore look to Congress' basic purpose in enacting this legislation, which was to provide access to our justice system to those who need it most. I can think of no other group more deserving than the many immigrants to this country. These people often have to appear before the Immigration and Naturalization Service (INS) without funds or friends to assist them in their legal skirmish with our government.

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1. E. Lazarus, *The New Colossus*, in America Forever Now (1968) (inscribed on the Pedestal of the Statute of Liberty).

The application of the EAJA to INS proceedings is an important issue and one would expect there to be diverse opinions, but that does not diminish the strength of my conviction that we should reverse the Board of Immigration Appeals decision. I do not foresee a great financial cost for our government if we allow prevailing parties in deportation proceedings to recover their attorneys' fees. Absent a definitive proscription of such award in the statute, I see no reason to dash the hopes and the ambitions of the many people who must appear before the INS in order to remain in this country. Therefore, I respectfully dissent.

**APPENDIX A-2**

U.S. DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

FALLS CHURCH, VIRGINIA 22041

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A28 305 678 - Houston

February 1, 1990

In re: ANA LUCIA *HODGE*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard S. Fischer, Esquire
P.O. Box 631946
Nacogdoches, Texas 75963

ON BEHALF OF SERVICE: Kimberly J. Barton
General Attorney

APPLICATION: Attorney fees under the EAJA

This matter arises as a result of deportation proceedings held within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, but solely concerns the respondent's application for attorney fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (the "EAJA"). By decision dated May 10, 1989, the immigration judge denied the application for fees and costs. The respondent appeals from this decision. For the reasons set forth in *Matter of Fede*, Interim Decision 3106 (BIA 1989), the appeal will be dismissed.

The Board and immigration judges (except as provided by statute) only have such authority as is created and delegated by the Attorney General.[1] *See* section 103 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1103; 28 U.S.C. §§ 503, 509 and 510. Under section 103(a) of the Act, the Attorney General has the authority to issue regulations and his determinations with respect to all questions of law are controlling. A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer. *See* sections 103(a), 236(a), and 242(b) of the Act, 8 U.S.C. §§ 1103(a), 1226(a), and 1252(b); 8 C.F.R. § 3.0; 28 C.F.R. Part 24; *Matter of Medina*, Interim Decision 3078 (BIA 1988); *Matter of Valdovino*, 18 I&N Dec. 343 (BIA 1982); *Matter of Bilbao-Bastida*, 11 I&N Dec. 615 (BIA 1966), *aff'd Bilbao-Bastida v. INS*, 409 F.2d 820 (9th Cir. 1969), *cert. dismissed*, 396 U.S. 802 (1969); *Matter of Tzimas*, 10 I&N Dec. 101 (BIA 1962).

The Attorney General has determined that immigration proceedings do not come within the scope of the EAJA. *See* 28 C.F.R. §24.103. *See also* 46 Fed. Reg. 48921, 48922 (Oct. 5, 1981) (interim rule with request for public comment).[2] Neither this

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1. Even the specific grants of statutory authority to immigration judges in the Act (*i.e.*, to conduct exclusion and deportation proceedings) are subject to limitations. For example, exclusion proceedings must be conducted in accordance with sections 235, 236, and 287(b) of the Act, 8 U.S.C. §§ 1225, 1226, and 1357(b), and "such regulations as the Attorney General shall prescribe." In deportation proceedings, the immigration judge may only make determinations "as authorized by the Attorney General" and the proceedings themselves must "be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe."

2. The supplemental information published with the 1981 interim rule made clear that the omission of deportation and exclusion proceedings from the rule was intentional. Apparently no public comments were received regarding this aspect of the interim rule. *See* 47 Fed. Reg. 15774 (1982) ("Supplementary Information").

Board nor an immigration judge has authority to consider a challenge to the Attorney General's determination in this regard. Thus, absent a regulatory change or controlling court order, an immigration judge has no authority under law or regulation to consider an application for attorney fees under the provisions of the EAJA. And, authority from one circuit is not binding in another. *Georgia Dep't of Med. Assistance v. Bowen*, 846 F.2d 708, 710 (11th Cir. 1988); *Generali v. D'Amico*, 766 F.2d 485, 489 (11th Cir. 1985).

In view of the controlling Departmental regulations, we find that the immigration judge in this case had no authority to consider an application for attorney fees and costs under the EAJA. Accordingly, the appeal will be dismissed and the respondent's application for attorney fees and costs under the EAJA will be denied.

ORDER: The appeal from the May 10, 1989, decision of the immigration judge is dismissed and the respondent's application for attorney fees and costs under the EAJA is denied.

James P. Morris
FOR THE BOARD

**APPENDIX A-3**

U.S. DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Immigration Court

Houston, Texas

File No.: A28 305 678

In re: ANA LUCIA HODGE

APPLICATION: Motion for Award of Attorney's Fees and Expenses Pursuant to the Provisions of the Equal Access to Justice Act, 5 U.S.C. 504 (a)(1)

ON BEHALF OF MS. HODGE: Richard S. Fischer, Esq.
P.O. Box 1946
Nacogdoches, Texas 75963

ON BEHALF OF SERVICE: Kimberly J. Barton, Esq.
Trial Attorney
Houston INS

DECISION AND ORDER OF THE IMMIGRATION JUDGE

In an Oral Decision issued on February 22, 1989, deportation proceedings instituted by the Immigration and Naturalization Service against the above-captioned individual were terminated by this court. The proceedings were instituted by the INS pursuant to a superseding Order to Show Cause issued August 3, 1988, and it was the finding decision and order of this court that "the proceedings were improvidently begun in light of (the Service's) failure to comply with 8 CFR 103.2(b)(2)." Both parties accepted that decision as a final determination of those proceedings.

On March 23, 1989, Ms. Hodge filed a Motion for Award of Attorney's Fees and Expenses pursuant to 5 U.S.C. Sec. 504(a)(1) (The Equal Access to Justice Act). Included with the Motion are affidavits from the attorneys who represented her in those deportation proceedings detailing services rendered and time spent, an affidavit from Ms. Hodge stating that her net worth has never been over $1,000,000.00, and a Memorandum of Law in support of the motion. The motion was timely filed under Equal Access to Justice Act requirements (within thirty days of the final decision). Additionally, the Service has failed to respond to the motion and request, and in accordance with prior advisement, the motion is therefore deemed to be unopposed. Nevertheless, for the reasons set forth below, this court must conclude that it is without subject matter jurisdiction to grant the request.

An immigration judge derives his/her authority from the provisions of the Immigration and Nationality Act, and the express delegations of authority provided by the Attorney General of the United States. *See* 8 U.S.C. Sec. 1103(a); 8 C.F.R. 3.9-.10; 28 C.F.R. 0.19. The Attorney General has expressly delegated authority to award fees under the Equal Access to Justice Act to a variety of agencies within the Department of Justice, but has not heretofore included among those agencies the Executive Office for Immigration Review or immigration judges. *See, e.g.*, 28 C.F.R. 24.103(a). In the absence of such delegated authority, it is the finding and belief of this immigration judge that I am without jurisdiction to evaluate claims arising under the Equal Access to Justice Act (henceforth "EAJA").

The only authority cited by the respondent for the proposition that awards under the EAJA are applicable to deportation proceedings is a case arising in the Ninth Circuit, *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (*en banc*). Initially it is noted that this court, Ms. Hodge, and the deportation proceedings in question all are located within the Fifth Circuit. Frequently the Board of Immigration Appeals has declined to extend decisions outside the particular circuit in which they arose, especially when such decisions, such as *Escobar Ruiz*, involve radical departures

from accepted or current practice. For example, in *Matter of Benitez*, Int. Dec. 2979 at 7 (BIA 1984), the Board declined to apply *Iran v. U.S.*, 656 F.2d 469 (9th Cir. 1981) to a case arising within the Fifth Circuit when it did not find the Ninth Circuit's reasoning persuasive. Though frequently the Ninth Circuit has been in the vanguard of creative interpretations of the immigration statutes, almost as frequently those interpretations have been rejected by the Supreme Court and other courts upon further review. *See, e.g., Wang v. INS*, 622 F.2d 1241 (9th Cir. 1980), *rev'd*, 450 U.S. 139 (1980); *Lopez-Mendoza v. INS*, 705 F.2d 1059 (9th Cir. 1983), *rev'd*, 468 U.S. 1032 (1984); *Plasencia v. Landon*, 637 F.2d 1286 (9th Cir. 1980), *rev'd*, 103 S.Ct. 321 (U.S. 1982); *Miranda v. INS*, 673 F.2d 1105 (9th Cir. 1982), *rev'd*, 459 U.S. 14 (1982); *Nicholas v. INS*, 590 F.2d 802, 805-08 (9th Cir. 1979), criticized or questioned in *Wan Chung Wen*, 543 F.Supp. 1016 (W.D.N.Y. 1982), *Ali v. INS*, 661 F.Supp. 1234 (D.Mass. 1986), *Pasquini v. Morris*, 700 F.2d 658 (11 Cir. 1983), and *Fano v. O'Neill*, 806 F.2d 1262 (5th Cir. 1987).

Though a strong dissenting opinion was issued by three Ninth Circuit judges in *Escobar Ruiz*, the dissent does not appear to relate to the jurisdictional issue and concerns of this court. Of more significant relevance would seem to be the stinging criticism of *Escobar Ruiz* provided by the Sixth Circuit Court of Appeals in *Owens v. Brock*, 860 F.2d 1363 (6th Cir. 1988). The court in *Owens* criticized the *Escobar Ruiz* decision on two grounds. The first of these was the apparent failure of the Ninth Circuit to consider basic rules of statutory construction. The *Owens* court observed that in analyzing whether Congress has waived immunity of the United States, such waiver must be construed strictly in favor of the sovereign. They were therefore critical of the reasoning of *Escobar Ruiz* absent proof or evidence in the EAJA legislative history that the conference committee understood or intended that the term "defined under", as it relates to the definition of "adversary adjudication", was to include within EAJA coverage proceedings which were not governed by 5 U.S.C. Sec. 554. Instead, the Ninth Circuit independently determined that "defined under" was to include proceedings conducted in a *similar*

*manner* to those governed by 5 U.S.C. 554, and thereby include proceedings under 8 U.S.C. The second ground of criticism by the *Owens* court was the Ninth Circuit's misplaced reliance on the model rules for the implementation of the EAJA issued by the Administrative Conference of the United States (ACUS), in that the ACUS rules both eschew a broad interpretation of 504(b)(1)(C) and embrace the "governed under" standard rejected in Escobar Ruiz. *Owens, supra* at 1366.

The EAJA requires "an agency than conducts an adversary adjudication" to award fees and other expenses to a prevailing party, unless the position of the agency was substantially justified or special circumstances would make an award unjust, 5 U.S.C. 504(a)(1). "Adversary adjudication" is defined as "an adjudication *under section 554* of this title in which the position of the United States is represented by counsel or otherwise..." (emphasis added). 5 U.S.C. 504(b)(1)(C)(i). Section 554 of Title 5 is part of the Administrative Procedure Act. Clearly, in order for an agency to be covered by the EAJA, it would have to be one already governed by the provisions of the Administrative Procedure Act.

The United States Supreme Court has held that deportation proceedings are directly governed by the Immigration and Nationality Act rather than by the Administrative Procedure Act, and that the Immigration and Nationality Act supersedes the Administrative Procedure Act. *See Marcello v. Bonds*, 349 U.S. 302 (1955). Accordingly, deportation proceedings would not seem to be "adversary adjudications" as defined in the EAJA.

Additionally, Section 292 of the Immigration and Nationality Act, 8 U.S.C. 1362, specifically provides that a respondent in deportation proceedings "shall have the privilege of being represented (at no expense to the Government)". The awarding of attorneys' fees, even where respondent is the prevailing party and/or the position of the INS was not justified, would effectively provide for representation at government expense and contrary to the express provisions of the Immigration and Nationality Act.

For the foregoing reasons, this court must conclude that it is without jurisdiction to award attorney's fees as requested. No findings are made with regard to prevailing parties, justification of INS position, or reasonableness of requested fees. The request is rejected solely upon jurisdictional grounds. Accordingly,

IT IS HEREBY ORDERED that Ana Lucia Hodge's motion for attorney's fees and expenses under the EAJA is DENIED in its entirety for lack of jurisdiction.***

May 10, 1989
Robert Brown
Immigration Judge

*** It is noted that subsequent to the completion of this decision, but prior to notification or service to the parties, the Board of Immigration Appeals issued two precedent decisions confirming the determination of this court that it lacks jurisdiction to award attorney fees under the EAJA. *See, Matter of Anselmo*, ID 3105, (BIA May 11, 1989) and *Matter of Fede*, ID 3106 (BIA May 11, 1989).
RB (May 25, 1989).

**APPENDIX B-1**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-4440

(Summary Calendar)

RODOLFO ESCOBEDO GONZALEZ,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of
The Board of Immigration Appeals

(No. A34 451 497)

(April 22, 1991)

Before JOHNSON, SMITH, AND WIENER, Circuit Judges.

PER CURIAM:*

Petitioner Rodolfo Escobedo Gonzalez is a Mexican citizen to whom an immigration judge granted relief from deportation under Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. § 1251(f). After the Immigration and Naturalization Service (INS) withdrew its appeal, Gonzalez moved for an award of attorney's fees pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C.

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* Local Rule 47.5 provides that "[t]he publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

§ 504. The immigration judge denied the motion; the Board of Immigration Appeals (BIA) dismissed Gonzalez' appeal and denied his application for attorney's fees. Gonzalez petitions this court for review of the BIA's decision denying his motion to recover attorney's fees and expenses.

Our recent decisions in *Hodge v. United States Dep't of Justice*, No. 90-4122 (Apr. 4, 1991), and *Amador-Castillo v. Immigration and Naturalization Service*, No. 90-4161 (Apr. 4, 1991), held--after addressing, as Gonzalez concedes, the issues he raises--that the EAJA does not apply to deportation proceedings before the INS. We, therefore, deny Gonzalez' petition for review.

**APPENDIX B-2**

U.S. DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

FALLS CHURCH, VIRGINIA 22041

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A34 451 497 - Houston

May 24, 1990

In re: RODOLFO *ESCOBEDO*-GONZALEZ,

IN DEPORTATION PROCEEDINGS

APPEAL

| | |
|---|---|
| ON BEHALF OF RESPONDENT: | Richard S. Fischer, Esquire<br>P.O. Box 631946<br>Nacogdoches, Texas 75963-1946 |
| ON BEHALF OF SERVICE: | Benjamin D. Somera<br>General Attorney |
| APPLICATION: | Attorney fees under the EAJA |

This matter arises as a result of deportation proceedings held within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, but solely concerns the respondent's application for attorney fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (the "EAJA"). By decision dated April 17, 1990, the immigration judge denied the application for fees and costs. The respondent appeals from this decision. For the reasons set forth in *Matter of Fede*, Interim Decision 3106 (BIA 1989), the appeal will be dismissed. The request for oral argument is denied.

The Board and immigration judges (except as provided by statute) only have such authority as is created and delegated by the Attorney General.[1] *See* section 103 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1103; 28 U.S.C. §§ 503, 509 and 510. Under section 103(a) of the Act, the Attorney General has the authority to issue regulations and his determinations with respect to all questions of law are controlling. A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer. *See* sections 103(a), 236(a), and 242(b) of the Act, 8 U.S.C. §§ 1103(a), 1226(a), and 1252(b); 8 C.F.R. § 3.0; 28 C.F.R. Part 24; *Matter of Medina*, Interim Decision 3078 (BIA 1988); *Matter of Valdovino*, 18 I&N Dec. 343 (BIA 1982); *Matter of Bilbao-Bastida*, 11 I&N Dec. 615 (BIA 1966), *aff'd Bilbao-Bastida v. INS*, 409 F.2d 820 (9th Cir. 1969), *cert. dismissed*, 396 U.S. 802 (1969); *Matter of Tzimas*, 10 I&N Dec. 101 (BIA 1962).

The Attorney General has determined that immigration proceedings do not come within the scope of the EAJA. *See* 28 C.F.R. §24.103. *See also* 46 Fed. Reg. 48921, 48922 (Oct. 5, 1981) (interim rule with request for public comment).[2] Neither this

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1. Even the specific grants of statutory authority to immigration judges in the Act (*i.e.*, to conduct exclusion and deportation proceedings) are subject to limitations. For example, exclusion proceedings must be conducted in accordance with sections 235, 236, and 287(b) of the Act, 8 U.S.C. §§ 1225, 1226, and 1357(b), and "such regulations as the Attorney General shall prescribe." In deportation proceedings, the immigration judge may only make determinations "as authorized by the Attorney General" and the proceedings themselves must "be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe."

2. The supplemental information published with the 1981 interim rule made clear that the omission of deportation and exclusion proceedings from the rule was intentional. Apparently no public comments were received regarding this aspect of the interim rule. *See* 47 Fed. Reg. 15774 (1982) ("Supplementary Information").

Board nor an immigration judge has authority to consider a challenge to the Attorney General's determination in this regard. Thus, absent a regulatory change or controlling court order, an immigration judge has no authority under law or regulation to consider an application for attorney fees under the provisions of the EAJA. And, authority from one circuit is not binding in another. *Georgia Dep't of Med. Assistance v. Bowen*, 846 F.2d 708, 710 (11th Cir. 1988); *Generali v. D'Amico*, 766 F.2d 485, 489 (11th Cir. 1985).

In view of the controlling Departmental regulations, we find that the immigration judge in this case had no authority to consider an application for attorney fees and costs under the EAJA. Accordingly, the appeal will be dismissed and the respondent's application for attorney fees and costs under the EAJA will be denied.

ORDER: The appeal from the April 17, 1990, decision of the immigration judge is dismissed and the respondent's application for attorney fees and costs under the EAJA is denied.

Mary Maguire Dunne
FOR THE BOARD

**APPENDIX B-3**

U.S. DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Immigration Court

Houston, Texas

File No.: A34 451 497

IN THE MATTER OF: RODOLFO ESCOBEDO-GONZALEZ,
Respondent

IN DEPORTATION PROCEEDINGS

APPLICATION: Motion for Award of Attorneys'
Fees and Expenses

ON BEHALF OF RESPONDENT: Richard S. Fischer, Esq.
408 E. Pillar
Nacogdoches, Texas 75961

ON BEHALF OF SERVICE: Benjamin D. Somera, Esq.
Trial Attorney
Houston, Texas

ORDER

Pending before the court is the motion of respondent's counsel (Richard S. Fischer, Esq.) for attorneys' fees and expenses incurred in the representation of respondent in his application for a waiver of a ground of deportation under Section 241(f) of the Immigration and Nationality Act.

Without commenting on the course of the proceedings after the hearing on the merits, the court would simply note that it

cannot imagine a case in which an award of attorneys' fees would be more warranted and appropriate. More specifically, the presentation of respondent's case by Mr. Fischer was marked by the care, preparation, precision, skill, and aggressive advocacy which are the hallmarks of every case in which this attorney appears in Immigration Court.

The Board of Immigration Appeals, however, has clearly held that, except for cases arising in those courts within the jurisdiction of the United States Courts of Appeals for the Ninth Circuit, attorneys' fees may not be awarded under the Equal Access to Justice Act to successful litigants in immigration proceedings. *Matter of Anselmo*, Int. Dec. 3105 (BIA 1989); *Matter of Fede*, Int. Dec. 3106 (BIA 1989). Accordingly, it is now hereby

ORDERED that counsel's motion for an award of attorneys' fees and expenses be DENIED.

April 17, 1990
SUSAN L. YARBROUGH
Immigration Judge

**APPENDIX C-1**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 90-4161

HAROLD J. AMADOR-CASTILLO,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of an Order of
the Immigration and Naturalization Service

(INS# A 23 620 165)

(April 4, 1991)

Before GOLDBERG, KING AND DUHÉ, Circuit Judges.

PER CURIAM:*

Petitioner Harold J. Amador-Castillo (Amador-Castillo) is a Nicaraguan citizen who seeks review of a decision by the Board of Immigration Appeals (BIA) denying his application for attorney's fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.

On October 12, 1987, the respondent Immigration and Naturalization Service (INS) served Amador-Castillo with an

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Order to Show Cause (OSC), charging him with entering the United States without inspection in violation of 8 U.S.C. § 1251(a)(2). The OSC also charged him with deportability based on his being convicted of two crimes involving moral turpitude after entry in violation of 8 U.S.C. § 1251(a)(4). At his August 3, 1988 deportation hearing, Amador-Castillo conceded his deportability and applied for political asylum and withholding of deportation. In his application for asylum, Amador-Castillo claimed fear of persecution, if he returned to Nicaragua, based on his family's past employment with the Somoza regime. On August 12, 1988, the United States State Department's Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs, advised that, based on his application for asylum, Amador-Castillo had shown a well-founded fear of persecution in Nicaragua. On September 20, 1988, after a hearing on the merits, the immigration judge denied Amador-Castillo's request for withholding of deportation but granted his application for asylum.

On October 20, 1988, Amador-Castillo filed a motion for attorney's fees pursuant to the EAJA. On September 8, 1989, the immigration judge, finding that he had no authority to grant fees under the EAJA, denied Amador-Castillo's request for fees. On September 15, 1989, Amador-Castillo appealed the decision of the immigration judge to the BIA. The BIA affirmed the decision of the immigration judge and dismissed the appeal on February 1, 1990, on the basis that the Attorney General had determined that immigration proceedings do not come within the scope of the EAJA and that the immigration judge had no authority to consider an application for attorney's fees under the EAJA.

II.

The question before us in this case is whether the EAJA applies to deportation proceedings before the INS. Based on our reasoning today in *Hodge v. United States Dep't of Justice*, No. 90-4122 (5th Cir. 1991) (a copy of which is attached hereto), we find that the EAJA does not apply to deportation proceedings before the INS. Accordingly, we AFFIRM the decision of the Board of

Immigration Appeals and DENY the petition for review.

GOLDBERG, Circuit Judge, dissenting:

For the reasons stated today in my dissent in *Hodge v. United States Dep't of Justice*, No. 90-4122 (5th Cir. 1991) (a copy of which is attached hereto), I respectfully dissent.

**APPENDIX C-2**

U.S. DEPARTMENT OF JUSTICE

FALLS CHURCH, VIRGINIA 22041

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A23 620 165 - Harlingen

February 1, 1990

In re: HAROLD J. *AMADOR*-CASTILLO,

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carter C. White, Esquire
ACLU South Texas Project
P.O. Box 188
San Juan, Texas 78589

ON BEHALF OF SERVICE: Mike Ochoa
General Attorney

APPLICATION: Attorney fees under the EAJA

This matter arises as a result of deportation proceedings held within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, but solely concerns the respondent's application for attorney fees and costs pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (the "EAJA"). By decision dated September 8, 1989, the immigration judge denied the application for fees and costs. The respondent appeals from this decision. For the reasons set forth in *Matter of Fede*, Interim Decision 3106 (BIA 1989), the

appeal will be dismissed. The request for oral argument is denied.

The Board and immigration judges (except as provided by statute) only have such authority as is created and delegated by the Attorney General.[1] *See* section 103 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1103; 28 U.S.C. §§ 503, 509 and 510. Under section 103(a) of the Act, the Attorney General has the authority to issue regulations and his determinations with respect to all questions of law are controlling. A regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges and neither has any authority to consider challenges to regulations implemented by the Attorney General, any more than there is authority to consider constitutional challenges to the laws we administer. *See* sections 103(a), 236(a), and 242(b) of the Act, 8 U.S.C. §§ 1103(a), 1226(a), and 1252(b); 8 C.F.R. § 3.0; 28 C.F.R. Part 24; *Matter of Medina*, Interim Decision 3078 (BIA 1988); *Matter of Valdovino*, 18 I&N Dec. 343 (BIA 1982); *Matter of Bilbao-Bastida*, 11 I&N Dec. 615 (BIA 1966), *aff'd Bilbao-Bastida v. INS*, 409 F.2d 820 (9th Cir. 1969), *cert. dismissed*, 396 U.S. 802 (1969); *Matter of Tzimas*, 10 I&N Dec. 101 (BIA 1962).

The Attorney General has determined that immigration proceedings do not come within the scope of the EAJA. *See* 28 C.F.R. §24.103. *See also* 46 Fed. Reg. 48921, 48922 (Oct. 5,

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1. Even the specific grants of statutory authority to immigration judges in the Act (*i.e.*, to conduct exclusion and deportation proceedings) are subject to limitations. For example, exclusion proceedings must be conducted in accordance with sections 235, 236, and 287(b) of the Act, 8 U.S.C. §§ 1225, 1226, and 1357(b), and "such regulations as the Attorney General shall prescribe." In deportation proceedings, the immigration judge may only make determinations "as authorized by the Attorney General" and the proceedings themselves must "be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe."

1981) (interim rule with request for public comment).[2] Neither this Board nor an immigration judge has authority to consider a challenge to the Attorney General's determination in this regard. Thus, absent a regulatory change or controlling court order, an immigration judge has no authority under law or regulation to consider an application for attorney fees under the provisions of the EAJA. And, authority from one circuit is not binding in another. *Georgia Dep't of Med. Assistance v. Bowen*, 846 F.2d 708, 710 (11th Cir. 1988); *Generali v. D'Amico*, 766 F.2d 485, 489 (11th Cir. 1985).

In view of the controlling Departmental regulations, we find that the immigration judge in this case had no authority to consider an application for attorney fees and costs under the EAJA. Accordingly, the appeal will be dismissed and the respondent's application for attorney fees and costs under the EAJA will be denied.

ORDER: The appeal from the September 8, 1989, decision of the immigration judge is dismissed and the respondent's application for attorney fees and costs under the EAJA is denied.

Mary Maguire Dunne
FOR THE BOARD

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2. The supplemental information published with the 1981 interim rule made clear that the omission of deportation and exclusion proceedings from the rule was intentional. Apparently no public comments were received regarding this aspect of the interim rule. *See* 47 Fed. Reg. 15774 (1982) ("Supplementary Information").

**APPENDIX C-3**

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

OFFICE OF THE IMMIGRATION JUDGE

HARLINGEN, TEXAS 78550

CASE NO.: A23 620 165

IN THE MATTER OF: AMADOR-CASTILLO, HAROLD J.
Respondent

IN DEPORTATION PROCEEDINGS

TO: Carter C. White, Esq.
P.O. Box 188
San Juan, Texas 78589

District Counsel
U.S. Immigration and Naturalization Service
2102 Teege Avenue
Harlingen, Texas 78550

ORDER

On October 20, 1988, counsel of record in the above entitled matter filed with this Court a request for attorney fees pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. Section 504 (1982).

This Court has no authority under the law to grant an award of attorney fees under EAJA. *See Matter of Anselmo*, Interim Decision 3105 (BIA 1989); *Matter of Fede*, Interim Decision 3106 (BIA 1989). Accordingly, counsel's request for such an award must be denied.

WHEREFORE, it is hereby Ordered that the request for attorney fees in this matter be denied in its entirety as a matter of this Court's jurisdiction.

DATED THIS 8th day of September, 1989.

HOWARD E. ACHTSAM
Immigration Judge

(3)

No. 91-83

Supreme Court, U.S.
FILED
AUG 14 1991
OFFICE OF THE CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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ANA LUCIA HODGE, ET AL., PETITIONERS

*v.*

UNITED STATES DEPARTMENT OF JUSTICE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT

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KENNETH W. STARR
*Solicitor General*

STUART M. GERSON
*Assistant Attorney General*

WILLIAM KANTER
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## QUESTION PRESENTED

Whether the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412(d), authorizes the award of attorney's fees for work performed in connection with administrative deportation proceedings conducted by the Immigration and Naturalization Service.

# In the Supreme Court of the United States

OCTOBER TERM, 1991

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No. 91-83

ANA LUCIA HODGE, ET AL., PETITIONERS

*v.*

UNITED STATES DEPARTMENT OF JUSTICE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT

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### OPINIONS BELOW

The opinion of the court of appeals in *Hodge* v. *United States Department of Justice* (Pet. App. A1-A12) is reported at 929 F.2d 153. The opinion of the Board of Immigration Appeals in that case (Pet. App. A13-A15) is unreported.

The opinion of the court of appeals in *Escobedo-Gonzalez* v. *INS* (Pet. App. A21-A22) is unreported, as is the opinion of the Board of Immigration Appeals (Pet. App. A23-A25) in that case.

The opinion of the court of appeals in *Amador-Castillo* v. *INS* (Pet. App. A28-A30), is unreported, as is the opinion of the Board of Immigration Appeals (Pet. App. A31-A33) in that case.

## JURISDICTION

The judgments of the court of appeals in *Hodge* and *Amador-Castillo* were entered on April 4, 1991, and the judgment in *Escobedo-Gonzalez* was entered on April 22, 1991. The petition for a writ of certiorari, including all three cases, was filed on July 2, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners are three individuals who prevailed in individual administrative deportation proceedings; each thereafter sought an award of attorney's fees under EAJA for his attorney's work in those proceedings. In each case, an immigration judge denied the fee request, and the Board of Immigration Appeals affirmed. Pet. App. A13, A23, A31-A32.

Each petitioner thereafter sought review by the Fifth Circuit of the denial of EAJA fees. In *Hodge*, the lead case, the court of appeals issued an opinion holding that EAJA does not apply to administrative deportation proceedings. Pet. App. A1-A11. The panel noted the "overwhelming judicial authority" contrary to petitioner's position (*id.* at A7), and aligned itself with that authority.[1] Judge Goldberg dissented. *Id.* at A11-A12.

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[1] The court of appeals noted that while the Ninth Circuit has held (in *Escobar-Ruiz* v. *INS*, 838 F.2d 1020 (1988)) that EAJA applies to INS administrative proceedings since they are similar to those governed by the Administrative

The same panel decided *Amador-Castillo* on the same date, on the basis of *Hodge*; Judge Goldberg again dissented. Pet. App. A28-A30. Shortly thereafter, a different panel relied on *Hodge* in denying the petition for review in *Escobar-Gonzalez*. *Id.* at A21-A22.

**ARGUMENT**

As petitioners acknowledge (Pet. 15-16, 20), their petition raises the same issue that is before the Court in *Ardestani* v. *INS*, cert. granted, No. 90-1141 (Mar. 4, 1991). *Ardestani* has been fully briefed in this Court, and is scheduled for oral argument on October 8, 1991. Accordingly, the instant petition should be held pending the Court's decision in *Ardestani*, and should then be disposed of in light of that decision.

Contrary to petitioners' suggestion, there is no reason for the Court to grant plenary review in the instant case. Although petitioners state that they have raised "additional arguments" (Pet. 20), their arguments are not significantly different from the argu-

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Procedure Act, four other circuits have concluded that EAJA extends only to administrative proceedings which—unlike those conducted by the INS—are subject to the APA. Pet. App. A4-A6, citing *Clarke* v. *INS*, 904 F.2d 172 (3d Cir. 1990); *Ardestani* v. *INS*, 904 F.2d 1505 (11th Cir. 1990), cert. granted, No. 90-1141 (Mar. 4, 1991); *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446 (D.C. Cir. 1989); and *Owens* v. *Brock*, 860 F.2d 1363 (6th Cir. 1988). Two more circuits have since joined the majority view, concluding that EAJA fees are not available for work performed in INS deportation proceedings. *Escobar* v. *INS*, 935 F.2d 650 (4th Cir. 1991); *Hashim* v. *INS*, 936 F.2d 711 (2d Cir. 1991).

ments of petitioner and amici in *Ardestani*.[2] Thus, there is no reason for the Court to depart from its customary practice of holding subsequent petitions for certiorari raising issues identical to those already pending on writ of certiorari, and then disposing of the subsequent petitions as appropriate in light of the decision in the case pending on writ of certiorari.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Ardestani* v. *INS*, No. 90-1141, and thereafter disposed of as appropriate in light of that decision.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

STUART M. GERSON
*Assistant Attorney General*

WILLIAM KANTER
JOHN S. KOPPEL
*Attorneys*

AUGUST 1991

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[2] We have addressed those arguments in our brief in *Ardestani*, a copy of which we are supplying to counsel for petitioners.

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